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In The

Supreme Court of the United States

October Term, 1972

No.

NORTH CAROLINA STATE PORTS AUTHORITY,
Petitioner

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, North Carolina State Ports Authority, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in the case of *International Longshoremen's Association, AFL-CIO, v. North Carolina Ports Authority,* et al., filed June 29, 1972.

OPINIONS BELOW

The final Judgment of the United States Court of Appeals for the Fourth Circuit, filed June 29, 1972, is not yet reported and is printed as Appendix A to this Petition (A, p-1). On July 7, 1972, the Circuit Court issued an Order staying its mandate pending this application for a writ of certiorari,

which Order is printed as Appendix C to this Petition (A, p-18).

The previous Judgment of the United States District Court for the Eastern District of North Carolina, Wilmington Division, is reported as *International Longshoremen's Association, AFL-CIO, v. North Carolina State Ports Authority*, 332 F. Supp. 95 (E.D. N.C., 1971) and is printed as Appendix B to this Petition (A, p-7).

JURISDICTION

The jurisdiction of this Honorable Court to review the Judgment of the United States Court of Appeals for the Fourth Circuit, filed June 29, 1972, is invoked pursuant to the authority conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED

IS THE NORTH CAROLINA STATE PORTS AUTHORITY A "CARRIER" WITHIN THE INTENT OF, AND SUBJECT TO, THE RAILWAY LABOR ACT?

STATUTES INVOLVED

Railway Labor Act

45 U.S.C. § 151, provides in pertinent part:

> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. . . .
>
> * * * * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission. * * *

45 U.S.C. § 151a. *General Purposes.*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 152.

* * * * *

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification, the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated, the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Administrative Procedure Act

Chapter 7 — Judicial Review

5 U.S.C. § 701. *Application; Definitions*

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 702. *Right of review*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT OF THE CASE

In November, 1968, the International Longshoremen's Association, AFL-CIO (hereinafter referred to as "ILA"), petitioned the National Mediation Board (hereinafter referred to as the "Board") stating in its petition that a representation dispute existed among the employees of the North Carolina State Ports Authority (hereinafter referred to as the "Authority") and praying that ILA be certified as employee representative. No other union sought to represent the employees of the Authority.

The Board, acting under 45 U.S.C. § 152, Ninth, authorizing it to investigate and resolve any dispute as to who is the representative of a carrier's employees, found that the Authority is a carrier within the meaning of the Railway Labor Act (hereinafter referred to as the "Act"). The Board also determined, despite the fact that no other union sought to represent the Authority's employees, that a representation dispute existed and certified that ILA was the appropriate representative of the Authority's employees in the classes of (1) dock and warehousemen and (2) security guards. The Authority was then requested to meet with the ILA to discuss the terms and conditions of employment concerning Authority employees.

The Authority declined to enter such negotiations on the ground that, as a State agency, it was forbidden by law to enter into any agreement with a labor union. N.C.G.S. § 95-98.

The ILA instituted this suit in the United States District Court for the Eastern District of North Carolina seeking a temporary restraining order and mandatory injunction to enforce the Board's findings and directions. Jurisdiction of the District Court was based upon 28 U.S.C. § 1337, 45 U.S.C. § 151 et seq., and 5 U.S.C. §§ 701 and 702.

The District Court found that the determination of the Board that the port railroads controlled by the Authority are "carriers" subject to the Interstate Commerce Act and, therefore, within the Board's jurisdiction under 45 U.S.C. § 151, First, was reviewable. The District Court further found that the port railroads are not in fact, "carriers" under the Interstate Commerce Act or 45 U.S.C. § 151, First. Pursuant to these findings, the District Court dismissed the case.

The ILA appealed the Judgment of the District Court to the United States Court of Appeals for the Fourth Circuit. The Circuit Court concurred in that part of the Judgment of the District Court concluding that the order of the Board was reviewable. It disagreed, however, with the finding of the District Court that the Authority is not a "carrier" within the intendment of the Act, 45 U.S.C. § 151, First. After finding that the Authority is a "carrier" for such purposes, the Circuit Court vacated and remanded the Judgment of the District Court.

The pertinent facts relative to the "carrier" status of the port railroads under the control of the Authority are as follows: They have never been certified by the Interstate Commerce Commission, nor have tariffs been filed with the Commission. The Commission has at no time attempted to exercise any form of jurisdiction over these railroads.

No revenues have been generated from the operation of the railroads. They are subsidized by the State as an integral part of its overall port operations. The railroads are operated solely within the boundaries of the State-owned property of the Authority for the convenience of its customers. The only contracts with interstate rail carriers are at two interchanges. The Authority owns the engines used within its boundaries, but it owns no rolling stock. The cars used are owned by interstate line-haul carriers. Loading and unloading of the cars is performed by Stevadore Company employees who are not paid by the Authority.

The port railroads operated by the Authority are provided solely to further the maritime purposes of the Authority by promoting seaborne commerce at North Carolina ports. They involve a total of nine miles of track at two ports with a total of fourteen people employed in railroad occupations. Despite this fact the Board certified the ILA as the representative of all of the Authority's more than three hundred dock and warehousemen and security guards.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW INVOLVES A STATUTORY CONSTRUCTION AND APPLICATION OF RECURRING SIGNIFICANCE IN THE ADMINISTRATION OF THE RAILWAY LABOR ACT, UNITED STATES CODE, TITLE 45, CHAPTER 8.

The holding of the Circuit Court strongly implies that all state-owned railroads, no matter how limited their functions, are "carriers" within the meaning of 45 U.S.C. § 151, First; and, thereby, within the jurisdiction of the Board. The implications of such a holding are of great importance to the Authority, and will be of recurring significance to other States which operate or contemplate operating state-owned railroads however limited their purpose.

This holding will discourage all States in their attempts to provide rail services for their citizens when such services will clearly not generate revenue and, therefore, have not been provided by private enterprise. This construction of the Act will also be of great fiscal importance to the Authority and to the other States which provide or consider providing such rail services. The consequences of a holding so expanding the jurisdiction of the Board are, therefore, of such significance in the administration of the Act as to be imposed only by this Court.

The decision of the Circuit Court is of further significance in the administration of the Act in that it permits the Board to completely ignore the position of the Interstate Commerce Commission relative to "carrier" status despite the fact that 45 U.S.C. § 151 is applicable here only if the Authority is a "carrier by railroad, subject to the Interstate Commerce Act." The Commission has not held the port railroads controlled by the Authority to be "carriers", and the Authority has not filed tariffs with the Commission or otherwise indicated "carrier" status. Further, the Commission has indicated in previous cases that it does not consider activities such as those engaged in by the port railroads controlled by the Authority to be the activities of a "carrier." See, *United States v. American S. & T. Plate Co.*, 301 U.S. 402.

The holding of the Circuit Court tending to indicate that the Board can ignore the views of the Commission could place the Authority and other States in an extremely disadvantageous situation. It is quite possible that the Commission will order recognized line-haul carriers to refrain from engaging in activities on the Authority's property. *United States v. American S. & T. Plate Co.*, supra. The Authority would then be required to perform the required rail activities on its property with the certainty that the Board would declare it to be a "carrier" within the meaning of the Railway Labor Act. The Authority would, therefore, be faced with the choice of becoming a "carrier" or closing its port. This seemingly unconscionable situa-

tion led Judge J. Braxton Craven of the Circuit Court to refer to this case at oral arguments as "the case of the reluctant railroad." Any determination that the Board may ignore the views of the Commission concerning the "carrier" status of the port railroads of the Authority should be made, if at all, only by this Court.

2. THE DECISION BELOW APPEARS INCONSISTENT WITH THE CASES DECIDED BY THIS COURT AS TO THE PROPER INTERPRETATION OF 45 U.S.C. § 151, FIRST.

The port railroads controlled by the Authority are operated for the sole purpose of complementing the maritime activities of the two ports involved. Freight cars owned by line-haul carriers are spotted by the port railroad employees at various points on Authority property. The cars are placed on the interchange with line-haul carriers either before or after they are hauled in interstate commerce by those carriers serving the port terminals. The Circuit Court held, nevertheless, that the activities of the port railroads controlled by the Authority gave it "carrier" status.

The holding of the Circuit Court appears inconsistent with cases previously decided by this Court. In the recent decision of *Edwards v. Pacific Fruit Co.*, 390 U.S. 538, this Court held that an express company which maintains and leases freight cars and incidental thereto owns plants, switching tracks and equipment, is not a "common carrier by railroad" within the meaning of the Act. That case strongly implied that a railroad does not attain "carrier" status unless it acts as a "carrier" by holding itself out to the general public as a common carrier for hire. An application of this principle to the present case would require a reversal of the Judgment of the Circuit Court below.

The cases in which this Court has determined that the rail-

roads involved were "carriers" under Federal law all involved similar facts not present in this case. In each of those cases, the railroads involved were for all practical purposes line-haul carriers for hire. They charged fees for transportation from one point to another unrelated to any other legitimate State interest, and, in most cases, served as links providing transportation to the general public between the lines of line-haul carriers. *California v. Taylor*, 353 U.S. 553; *United States v. California*, 297 U.S. 175; *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296. In at least one of these cases, the railroad involved was conceded to be a "carrier" and filed its tariffs with the Interstate Commerce Commission. *California v. Taylor*, supra.

In the present case, the Authority does not serve as a link between *other* line-haul carriers. Its port railroads move cars only within the confines of their individual terminals for customers of the Authority and do not make their services available to the public generally. Their only function is to complement the maritime and storage activities at their individuals ports. An extension of the jurisdiction of the Board to such cases should only be made by this Court.

Further, the holdings of both the Board and the Circuit Court seem to conflict with the opinion of this Court in the case of *California v. Taylor*, supra. In that case the Court held that State-owned railroads are *not necessarily exempt* from the Railway Labor Act. It did *not* hold that State-owned railroads are *automatically included* within the terms of that Act. The holdings of the Board and the Circuit Court tend to expand the coverage of the Act to automatically include State-owned railroads. Any such extension should only be made by this Court.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS

TO THE PROPER ADMINISTRATION OF 45 U.S.C. § 151, FIRST.

The Fourth Circuit's opinion in this case indicates that the Board need not be guided by the view of the Interstate Commerce Commission concerning the issue of "carrier" status of any railroad. The Seventh Circuit appears to take a conflicting view. That Court has, in at least one case, determined that the Interstate Commerce Commission is the proper authority to determine whether a railroad is within the scope of and subject to the Railway Labor Act. *Chicago, S.S. & S.B. R.R. v. Fleming*, 109 F. 2d 419 (7th Cir., 1940). Although that case involved the Commission's powers under the *proviso* to 45 U.S.C. § 151, the Court in no way limited its statement concerning the powers of the Commission. cf., *United States v. American S. & T. Plate Co.*, supra.

These conflicts justify the grant of certiorari to review the Judgment of the Circuit Court below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 71-2005

International Longshoremen's Association, AFL-CIO,

Appellant,

v.

North Carolina Ports Authority, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Algernon L. Butler, Chief District Judge.

(Argued March 6, 1972 Decided June 29, 1972.)

Before Bryan, Senior Circuit Judge, and Winter and Craven, Circuit Judges.

Julius Miller (Gleason and Miller on brief) for Appellant, and Burley B. Mitchell, Jr., Assistant Attorney General of North Carolina, (Robert Morgan, Attorney General of North Carolina on brief) for Appellees; (L. Patrick Gray, III, Assistant Attorney General, Walter H. Fleischer and Robert M. Feinson, Attorneys, Department of Justice on brief) for The National Mediation Board as Amicus Curiae; (Daniel R. McLeod, Attorney General of South Carolina, R. Evan Palmer, Assistant Attorney General, and Ellison D. Smith, IV on brief) for Amicus Curiae of South Carolina State Ports Authority in Support of North Carolina State Ports Authority.

Albert V. Bryan, Senior Circuit Judge:

The Railway Labor Act, 45 USC §§ 151-188, is the fulcrum

upon which the International Longshoremen's Association, AFL-CIO, sought an injunction to require the North Carolina State Ports Authority to enter into good faith negotiations to reach agreement concerning rates of pay, rules and working conditions. The injunction was refused and the suit dismissed on the ground of lack of jurisdiction, the District Judge finding that the Authority is not a "carrier" within the intent, and subject to, the provisions of the Act. The union appeals.

Litigation began with the petition of ILA in November, 1968, to the National Mediation Board, stating that a representation dispute existed among the Authority's employees and praying that ILA be certified as employee representative. One of the Board's duties is to investigate and resolve any dispute as to who is the representative of a carrier's employees and to certify the name of the one so designated. 45 USC 152, Ninth. The Board, after a hearing on August 5, 1969, finding that the Authority is a carrier within the meaning of the Act and that a representation dispute existed, certified that ILA was the recognized representative of the Authority's employees in the classes of (1) dock and warehousemen and (2) security guards.

The union then asked the Authority to meet with it and discuss changes in employee rules, working conditions, and pay, including pension, welfare and seniority rights. The Authority rejected that request on the ground that, as a State agency, it was forbidden by law to enter into any agreement with a labor union. N.C. Gen. Stat. § 95-98 (Repl. Vol. 1965). Thereupon ILA instituted this suit in the District Court to declare the State statute unenforceable in the face of the Railway Labor Act and to compel the Authority to negotiate.

Over the objection of the union, the District Judge concluded (1) that the order of the Board was reviewable, but (2) that the Authority was not a carrier within the jurisdiction of the Board. The latter conclusion, he felt, rendered in-

appropriate any resolution of the "other issues presented to the court".

The pertinent facts are as follows. The North Carolina Ports Authority is a State agency operating terminals on State property in the seaports of Morehead City and Wilmington. At each facility freight is received from ships for transfer to line-haul railroads or motor carriers, or received from the trains and trucks for transfer to ships. The Authority operates terminal railroads with its own locomotives over approximately six miles of trackage at Wilmington and three at Morehead City. Each facility has an "interchange" where the Authority's locomotives receive freight cars from line-haul railroads, and where the line-haul railroads pick up cars, loaded and unloaded. One-half of all freight moving through the terminals is carried by the approximately 9,000 railroads cars handled each year by the facilities, and one-half is transported by motor carrier.

There is no tariff for line-haul switching but the Authority does charge either owners or their consignees for loading and unloading rail and truck shipments. A fee is also required by the Authority for storing and warehousing goods. At Wilmington there are eleven and at Morehead City three employees engaged solely in the operation of railroad equipment. Other Authority employees are engaged as warehousemen, security guards, and office workers. The loading and unloading of ships is done by stevedores who are not employees of the Authority. The Interstate Commerce Commission has never classified the Authority or either of the terminals an interstate carrier.

I. The critical issue in the case is whether, under the Act, the Authority is a "carrier". If it is not, then the Board obviously has no jurisdiction over the controversy. The union contends that the Board's finding that the Authority is a carrier is not reviewable by the court. However, because it is a jurisdictional issue, we think the Board's ruling is reviewable.

See, e.g., Barlow v. Collins, 397 US 159 (1970); United States v. Feaster, 410 F2d 1354 (5 Cir.), cert. denied, 396 US 962 (1969).

Nothing in the Railway Labor Act forecloses this inquiry. Despite its citation by the union, Switchmen's Union v. Board, 320 US 297 (1943), is not precedent to the contrary. True, the Court refused to allow court-review of a Board certification. There, however, the issue was not one of jurisdiction, but of the validity of a Board ruling on a substantial subject clearly within its authorized field. The dispute was as to which of two unions was entitled to be the employees' representative. In short, the Court simply refused to allow the "merits of the claim" to be reconsidered on review. Railway Clerks v. Employees Ass'n, 380 US 650, 659 (1965).

Switchmen's was distinguished on this head in United States v. Feaster, supra, 410 F2d at 1361-62. There, the Court said that *Switchmen's* "does not preclude judicial review of questions of law which bear directly upon the jurisdiction of the Mediation Board." Id. at 1361. *Feaster* commented also upon the possibility that *Switchmen's* had been "undermined", and noted that its "sweeping language" had been narrowed, by the subsequent enactment of the Administrative Procedure Act. Section 10 of the Act provides for review:

> "... except to the extent that—
>
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law." 5 USC 701.

It further guarantees that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action with-

> in the meaning of a relevant statute, is entitled to judicial review thereof." 5 USC 702.

The Railway Labor Act does not "preclude judicial review" or commit all action by the Mediation Board to its discretion. Air Line Dispatchers Ass'n v. Nat'l Mediation Bd., 189 F2d 685, 689 (D.C.Cir. 1951).

Finally, in Barlow v. Collins, supra, 397 US at page 166, the Court summarized the question of reviewability of agency action in this way:

> "As we said in *Data Processing Service*, preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. Indeed, judicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated. . . ." (Citations omitted.)

On this reasoning, we hold that the instant ruling of the National Mediation Board was reviewable by the District Court.

II. However, we must disagree with the determination of the District Court that the Authority is not a "carrier" within the intendment of the RLA. The Act, 45 USC 151, contains this definition:

> "First. The term 'carrier' includes any . . . carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, . . . storage, and handling of property transported by railroad. . . ."

This prescription includes State-operated facilities. California v. Taylor, 353 US 553 (1957).

Here, the Board, applying this definition to the agreed facts, determined that the Authority is a "carrier":

> "Although neither of these railroad facilities appear to be certified by the Interstate Commerce Division as an interstate carrier, it is undisputed that the operations of the terminal railroad include the movement of freight to and from freight cars owned by interstate carriers, the switching of railroad cars and the storage of freight moved in interstate and foreign commerce. Title 45, U.S.C.A., Section 151, First, by its terms expressly covers companies 'under common control', with any carrier by railroad. . . ."

Plainly, the Authority is a link in interstate and foreign carriage of shipments controlled by ship and railway companies.

Whether the statutory meaning of "carrier" is a point of law or a question of fact is presently immaterial. If the former, then we think the term includes such facilities as the Authority provided. Nevertheless, if the resolution of the matter be one of fact for the Board, the finding cannot be appraised as without substantial support in the evidence when the agreed modus operandi of the Authority is recalled. Moreover, it is such a finding as is well within the province of the Board.

The judgment dismissing the suit of the union is vacated, and the action reinstated for adjudication of the other controversies between the parties.

Vacated and Remanded.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION
NO. 1462—CIVIL

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Plaintiff,	:	
v.	:	ORDER
NORTH CAROLINA STATE PORTS AUTHORITY, Defendant.	:	

This cause originally came on to be heard pursuant to an order issued to the defendants to show cause why a preliminary injunction should not issue pending the final hearing and determination of this action requiring defendant, pursuant to the Railway Labor Act, 45 U.S.C. § 152, paragraph First, to commence immediately good faith negotiations with the plaintiff to make an agreement concerning rates of pay, rules, and working conditions on behalf of those employees of the defendant for whom the plaintiff has been certified as representative by the National Mediation Board. The court has considered affidavits and legal memoranda submitted by both parties and Georgia Ports Authority as Amicus Curiae, and has heard oral argument of counsel in chambers at Clinton, North Carolina. The parties have stipulated and agreed upon the following

STIPULATION OF FACTS

1. The North Carolina Ports Authority is an agency of the

State of North Carolina, having been established pursuant to North Carolina General Statute 143-216, et seq., which was enacted by the North Carolina General Assembly in 1949.

2. The Ports Authority owns and operates two port terminals in North Carolina at Wilmington, North Carolina, and at Morehead City, North Carolina, and as an integral part of such terminals operates terminal railroads at such port sites.

3. At its port terminal in Wilmington, the Authority owns and maintains approximately six miles of track, and at its terminal in Morehead City, it owns and operates approximately three miles of track.

The terminal railroad at Wilmington was originally a port of the shipyard operation carried on at the site of World War II. Subsequently, this property was leased from the Federal Maritime Administration by the North Carolina Ports Authority under a lease-sale agreement.

The terminal railroad at both terminals is contained solely on Ports Authority property. At each terminal, there is an "interchange" with line-haul carriers. At Wilmington, the interchange is with the Seaboard Coast Line Railroad and at Morehead City, the interchange is with the Southern Railroad and the Beaufort and Morehead Railroad.

The "interchange" is the area where the Ports Authority receives rail cars from the line-haul carrier or the point where the line-haul carrier picks up rail cars, both loaded and unloaded. It is the point where the Authority's track joins with the track of the line-haul carrier.

That neither of these facilities is certified by the Interstate Commerce Commission as an interstate carrier.

No tariffs have been filed with the Interstate Commerce

Commission and no tariffs are collected by the defendants for line-haul switching. However, the defendant does charge the owner or consignees of goods for the loading and unloading of boxcars and trucks.

The Ports Authority does, as a part of its operation, own warehouses on its terminals and does charge for the storage and warehousing of goods and commodities which arrive either by rail or truck from within or without the state or from ships from foreign or domestic ports.

4. All employees at the North Carolina port terminals are employed by the Ports Authority, an agency of the State of North Carolina, and receive their wages from the Ports Authority.

5. A substantial portion of all in-bound freight by rail and motor carrier is unloaded by employees of the Ports Authority and likewise, a substantial portion of out-bound freight by rail and motor carrier is unloaded by employees of the Ports Authority directly from a rail car to a ship. When a dock crane is used in this operation, the crane with an operator (who is an employee of the Ports Authority) is leased to the stevedore company. The operator of the dock crane is paid by the Ports Authority but is under supervision of the stevedore company.

6. Approximately 9,000 rail cars per annum are handled at both port terminals. Of all freight moving through the port terminals, approximately one-half in volume is carried by motor carrier.

In less than 1% of freight handled by rail, the line-haul carrier includes in its tariffs an amount for handling, loading and unloading services and this amount is paid by the carrier to the Authority. However, the amount paid by the railroad is not sufficient to cover the cost of handling and the remainder is paid by the owner of the freight.

7. All in-bound freight which is ship-borne is unloaded by stevedore company employees (longshoremen) onto the dock and is placed in transit sheds, apron or adjacent ramp, called a "point of rest." At no point do State Ports Authority employees load or unload directly from a ship. Once commodities or freight is unloaded by the stevedore company employees, it is placed by them in transit sheds, open areas or adjacent ramps. From this point on, it may be taken to a warehouse or other storage location by employees and equipment of the Authority or it may be loaded from the transit sheds, open dock areas or adjacent ramps into truck or rail cars for outbound shipment.

8. As to incoming freight unloading from railroad or truck, this is done by Ports Authority employees. Such freight may first go to warehouses and subsequently be moved by Authority employees to transit sheds, or open storage areas, or it may be moved directly to transit sheds or dock areas where it is then placed aboard ship by stevedore company employees for outbound shipment.

9. At the Wilmington terminal, there are eleven employees of the Ports Authority engaged solely in the operation of railroad equipment. These employees are classified by the Authority as Yard Conductor, Assistant Yard Conductor, Switchman-Engineer and Switchman-Engineer Trainee. At Morehead City, three such employees are engaged solely in the operation of railroad equipment.

10. As to freight which is to be exported by ship, the line-haul carrier pushes the loaded rail cars onto the track of the Ports Authority. At this point, the employees of the Ports Authority engaged in the operation of the rail equipment pick up the cars and move them cross-terminal to warehouses or transit sheds. Occasionally, the engine of the Authority goes a short distance onto the line-haul carrier's track to pick up

cars but this is not customary. This is not done at the Morehead City terminal.

11. As to freight which is to be shipped from the Ports Authority, the loaded rail cars are pulled cross-terminal by Authority switch crews and pushed to the interchange track where the line-haul carrier picks them up. Occasionally, but not customarily, the engine of the Authority pushes the cars onto the track of the line-haul carrier. This is not done at Morehead City.

12. The Authority makes no charge to the line-haul carrier for the switches onto and off the interchange.

13. The three line-haul carriers are interstate carriers subject to the jurisdiction of the Interstate Commerce Commission.

14. The employees of the Authority classified as Yard Conductor, Assistant Yard Conductor, Switchman-Engineer and Switchman-Engineer Trainee do not engage in the loading and unloading of rail cars; their duties being to "spot" or locate the cars for loading and unloading.

15. Rail maintenance of trackage owned by the Authority is not done by Authority employees.

16. On November 15, 1968, the International Longshoremen's Association filed an application with the National Mediation Board, alleging that a dispute existed involving employees of the North Carolina State Ports Authority. Notice of such alleged dispute was acknowledged by the Attorney General of North Carolina by letter dated December 23, 1968, denying that a dispute existed or that the Authority was subject to the Railway Labor Act.

17. On June 16, 1969, the Attorney General of North Caro-

lina received notice from the National Mediation Board as to the application of the International Longshoremen's Association.

18. That on August 5, 1969, at the offices of the National Mediation Board, a hearing was held to determine the existence of a dispute at the North Carolina Port terminals among Port Authority employees, at which time, the Attorney General of North Carolina, repesenting the Ports Authority, filed certain motion raising constitutional questions as to the International Longshoremen's Association and the jurisdiction of the National Mediation Board. The Attorney General also filed a motion with the Board asking that the International Longshoremen's Association be made to produce the authorization cards or other writing upon which it alleged a dispute existed at the North Carolina Ports Authority. The motion to make the International Longshoremen's Association produce the authorization cards was denied. The Board ultimately determined that it had jurisdiction and no specific disposition was made of the constitutional due process issue.

On November 4, 1969, the National Mediation Board issued its "Findings Upon Investigation" which are Exhibit A of plaintiff's complaint.

Subsequently, an election was conducted by the Board and as a result thereof, the International Longshoremen's Association was certified on February 24, 1970, as the representative as set forth in Exhibit B of the plaintiff's complaint.

And the parties having stipulated that no further evidence is required for the court to determine this action on the merits and that the court may render a final determination on the record before it, the court thereupon makes the following

CONCLUSIONS OF LAW

1. That several issues have been raised by the pleadings.

These issues include: (1) Can the National Mediation Board's determination that the railroad is a "carrier" be reviewed by this court? (2) If the determination may be reviewed, is the railroad, in fact, a "carrier" under the Railway Labor Act? (3) Does the Railway Labor Act apply to the employees in this case? (4) Did defendant receive procedural due process at the National Mediation Board hearing? (5) Is defendant a separate legal entity from the State of North Carolina or a mere alter ego of the State thus creating an Eleventh Amendment question?

2. Defendant contends that it is not a "carrier" under 45 U.S.C. § 151, paragraph First. Plaintiff contends that the defendant is a "carrier", and that the findings by the Board are not reviewable by the courts.

It is clear that the review of decisions of the National Mediation Board is quite limited. For example, the Board has exclusive jurisdiction over the certification of bargaining units and the classification of employees for the purposes of bargaining. And "the exercise of discretion by the Board with respect to such matters is not subject to review by the courts." Rose v. Brotherhood of Railway and Steamship Clerks, 181 F. 2d 944, 946 (4th Cir. 1950). But the non-reviewability of Board findings appears limited to those discretionary matters where its function is essentially that of a referee. Switchmen's Union of North America v. National Mediation Board, 64 S.Ct. 95 (1943), does not require a different result. That case involved the issuance by the Board of a certificate of representation for collective bargaining. Upon a suit by an opposing union, the court held the Board's action to be non-reviewable. Cases subsequent to *Switchmen's Union* have ingrafted exceptions even to this rule. *See*, e.g., Airline Dispatcher's Assn. v. National Mediation Board, 189 F. 2d 685 (D.C.Cir. 1951); Aeronautical Radio, Inc. v. National Mediation Board, 255 F. Supp. 466 (D.D.C. 1966).

No cases have been cited holding that the subject matter jurisdiction of the Board is non-reviewable. Indeed, it appears that the geographical jurisdiction of the Board has specifically been held reviewable. Airline Dispatcher's Assn., *supra*. The most recent case is United States v. Feaster, 410 F. 2d 1354 (5th Cir. 1969), *cert. denied*, 396 U.S. 962 (1969). In *Feaster*, the question of jurisdiction of the Board was held premature, since the suit came prior to a representation election. But dicta in *Feaster* lends support to the view that the Board's jurisdiction is reviewable. The court stated it is possible, but not certain that the Board's determination that the plaintiff Docks Department is a "carrier" may "*eventually* be a proper subject for judicial review," *Id.* at 1364, and that "while *Switchmen's Union* holds that there is no judicial review where the Board has exercised its informed discretion in resolving inter-union representation disputes, *it does not preclude review of questions of law which bear directly upon the jurisdiction of the Mediation Board.*" *Id.* at 1361 (emphasis added).

Jurisdiction refers to the very power of the Board to hear a controversy. In a civil case, subject matter jurisdiction, unlike personal jurisdiction, may be raised for the first time even on appeal. Rule 12 (h), Federal Rules of Civil Procedure. Defendant here has consistently objected to the Board's jurisdiction. Denial of review of the Board's jurisdiction would be the denial of a substantial right. There must be a remedy for such an alleged misinterpretation of statutory powers. "No such presumption of obliteration of rights may be entertained." Switchmen's Union of North America v. National Mediation Board, 64 S.Ct. 95, 104 (1943) (disventing opinion).

3. Once it is decided that the Board's jurisdiction may be reviewable, it becomes necessary to determine whether the Board had subject matter jurisdiction, *i.e.*, whether the defendant is a "carrier" under the Act.

"[T]he term 'carrier' includes any . . . carrier by railroad,

subject to the Interstate Commerce Act . . ." 44 U.S.C. § 151. The cases make it clear that state-owned railroads are subject to the Railroad Labor Act. *See*, e.g., State v. Taylor, 77 S.Ct. 1037, 1043 (1957). Note also that the Federal Employers' Liability Act (45 U.S.C. § 51) applies to every common carrier by railroad in interstate commerce and that the fact that the railroad is state-owned does not change this result. Parden v. Terminal Ry. of Ala., 84 S.Ct. 1207 (1964).

Thus, if the terminal railroad in the case at bar is a carrier in interstate commerce, then the Act applies. The commerce in question is certainly interstate in nature. While cases hold that a state-owned terminal railroad *may* be a "carrier", the issues must be determined by the facts in each case. In the cases cited *supra*, the railroads were conceded to be carriers. The facts surrounding those cases justify such a conclusion. For example, in the *Taylor* case the railroad paralleled the San Francisco waterfront, served wharves and industrial plants, and connected with car ferries, docks, and three interstate railroads. It filed tariffs with the Interstate Commerce Commission and was treated by the Commission as subject to its jurisdiction. It employed between 125 to 255 persons.

In the *Parden* case the state-owned railroad owned fifty miles of track in Mobile. It served the docks and several industries in the vicinity and operated an interchange railroad with several privately-owned railroad companies. It had contracts with railroad brotherhoods under the Railway Labor Act, maintained equipment under the Federal Safety Appliance Act, and kept records under Interstate Commerce Commission requirements. In United States v. California, 56 S.Ct. 421, involving the Safety Appliance Act, the State Belt Railroad served some 175 industrial plants and transported empty or loaded cars between four interstate rail carriers. It received and transported all freight cars offered to it by railroads, steamship companies, and industrial plants. It made a flat charge per

car for its services. The railroad was held to be a public carrier for hire.

In the present case, defendant has a total of nine miles of track at two ports. It employs fourteen people in railroad occupations. It has never been certified by the Interstate Commerce Commission, nor have tariffs been filed with the Commission. No revenues have been generated from the operation of the railroads. They are subsidized by the state as an integral part of its overall port operations. The railroads are operated wholly within the boundaries of state-owned property. The only contacts with interstate carriers are at two interchanges. Defendant owns the engines but no rolling stock. Loading and unloading is done by stevedore company employees. Goods are carried in cars owned by the interstate carriers. The services are performed to further maritime purposes of the Ports Authority, *i.e.*, to promote seaborne commerce at North Carolina ports.

The Ports Authority admittedly performs some railroad functions. In Edwards v. Pacific Fruit Express Co., 88 S.Ct. 1239 (1968), the defendant owned, maintained, and leased refrigerator cars to railroads. It owned buildings, plants, switching tracks, and repair equipment. It was held that defendant was not a common carrier under the Federal Employers' Liability Act. The Court stated: ". . . the words 'common carrier by railroad' mean 'one who operates a railroad as a means of carrying for the public . . .'" *Id.*, at 140.[1] In the present case the defendant's railroads are not held out to the public as a carrier. They are not for hire.

The fact that the terminal railroads in the instant case have not been certified by the Interstate Commerce Commission and have not filed tariffs with the Commission does not prevent a finding that they are carriers. But if they are car-

1/*See* also, McCrea v. Harris County Houston Ship Channel Nav. Dist., 423 F.2d 605 (5th Cir. 1970), *Cert. denied*, 400 U. S. 927 (1970).

riers, the Commission clearly has jurisdiction over them. "The Interstate Commerce Commission has jurisdiction over common carriers engaged in interstate transportation of passengers or property by railroad." 13 Am. Jur. 2d Carriers § 39. And it is significant that the Commission has not attempted to exercise any jurisdiction over the defendant's railroads.

The court having decided that the determination of the National Mediation Board that the state port railroad is a "carrier" under the Railway Labor Act is reviewable and that the railroad is, in fact, not a "carrier" under the Act, it is not necessary to discuss and rule on the other issues presented to the court.

NOW, THEREFORE

It is ORDERED and ADJUDGED that the plaintiff is not entitled to the relief sought; that the action be dismissed on the merits, and that the defendant recover of the plaintiff its costs.

This 24th day of September 1971.

Algernon L. Butler
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 71-2005

International Longshoremen's
Association, AFL-CIO,

Appellant,

versus

North Carolina Ports Authority,
James W. Davis, Wilmington, N. C.,
The Hon. Robert Morgan, Attorney-General
State of N.C., Raleigh, N. C., The
Hon. Woodrow Price, Chairman, 215
McDowell St., Raleigh, N. C.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT WILMINGTON.

Upon motion of the appellees, by their counsel and for cause shown,

IT IS ORDERED that the mandate in the above entitled case be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court as prescribed by law within sixty (60) days or on or before August 28, 1972.

July 7, 1972

For the Court—by Direction.
s/ Samuel W. Phillips
CLERK

A true Copy, Teste:
Samuel W. Phillips, Clerk
By France S. Sewell
Deputy Clerk